ESTTA Tracking number: **ESTTA671236**

Filing date: **05/08/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205896
Party	Defendant Wild Brain Entertainment, Inc.
Correspondence Address	JONATHAN D REICHMAN KENYON & KENYON LLP ONE BROADWAY NEW YORK, NY 10004 UNITED STATES jreichman@kenyon.com, wmerone@kenyon.com, nsardesai@kenyon.com, tm-docketny@kenyon.com
Submission	Reply in Support of Motion
Filer's Name	William M. Merone
Filer's e-mail	tmdocketdc@kenyon.com, tmdocketny@kenyon.com, wmerone@kenyon.com
Signature	/William M. Merone/
Date	05/08/2015
Attachments	REPLY ISO Request for Reconsideration.pdf(26766 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BEAU L. TARDY,

Opposer,

Opp. No. 91205896

v.

WILD BRAIN ENTERTAINMENT, INC.

Applicant.

REPLY IN SUPPORT OF APPLICANT'S REQUEST FOR RECONSIDERATION OF THE BOARD'S APRIL 3rd ORDER

Applicant, Wild Brain Entertainment, Inc., submits this reply in support of its request (D.I. 52) that the Board reconsider the Order (D.I. 51) that it issued on April 3, 2015 denying Applicant's Renewed Motion to Compel (D.I. 45). As Applicant explained in its request, the Board erred in denying Applicant's Renewed Motion to Compel as moot because the Board mistakenly assumed that the parties had email discussions relating to discovery subsequent to the filing of Applicant's motion and that Opposer then made curative disclosures. *See* D.I. 52, pp. 1-2; *see also* D.I. 51, p. 2 (crediting Opposer as making representations to that effect); *cf.* D.I. 48, p. 1 (Opposer's brief). As detailed in Applicant's request, however, Opposer's disclosures were made *before* Applicant filed its renewed motion to compel, and the inadequacy of those disclosures **was the basis for, and was thoroughly detailed in, Applicant's renewed motion.** *See* D.I. 52, pp. 2-3 (quoting and discussing D.I. 45, pp. 3-4); *see also* D.I. 45, Exs. C(1)-(11), D, E (attaching as exhibits Opposer's disclosures along with the parties' email exchanges).

In his opposition to Applicant's request for reconsideration, Opposer does not dispute that the Board's finding of mootness was based on a mistake of fact. *See* D.I. 56. To the contrary, Opposer admits that his "Supplemental Disclosures" were the subject of Applicant's Renewed Motion to Compel. *See id.*, p. 1. Thus, Applicant submits that the basis for its request for reconsideration may be treated as having been conceded. *See* 37 CFR § 2.127(a).

Instead, Opposer—in a complete disregard for procedure—has filed multiple Notices of Reliance (D.I. 53-55)[1] and strangely argues that because all of the material in those filings supposedly was "provided to Applicant on other occasions," Applicant's request for reconsideration is now somehow "moot on the merits." *See* D.I. 56, p. 1. Opposer then closes by making an argument that can only be described as an attempt to reargue the merits of the Renewed Motion to Compel (*see id.*, p. 2) (discussing such topics as the exhaustion of "procedural means"), notwithstanding the Board's admonition that a party who fails to respond on the merits of a request for reconsideration cannot use the occasion of the request "as a second opportunity to file a brief in opposition" to the original, underlying motion. *See* TBMP, § 518.

Whether Opposer has disclosed all of the evidence on which he intends to rely during trial is not the issue before the Board. This is a request for *reconsideration*. However, even if this *were* the appropriate place to delve back into the merits of Applicant's Renewed Motion to Compel, the fact that Opposer may have disclosed everything he will use "in [his] final brief" (*see* D.I. 56, p. 1) is irrelevant to whether Opposer has disclosed all of the information and

[1] To understand how far through the looking glass Opposer has stepped by filing his Notices of Reliance, the Board should understand that trial has not yet even *opened* in this case. *See* D.I. 52, p. 2; *cf.* 37 CFR 2.122. Furthermore, most of the material that Opposer has attached to his premature filings may not even properly be introduced through a Notice of Reliance.

documents **that Applicant requested during discovery**, including by providing narrative answers to the propounded interrogatories and by producing all documents responsive to Applicant's requests. *See* D.I. 45, pp. 4-7. Seeking information is the whole point of discovery.

As Applicant has noted before, Opposer's obligations when responding to the discovery served in this case are hardly unprecedented—the Federal Rules require Opposer to provide full, narrative answers to Applicant's interrogatory requests and to produce all documents in his possession, custody, or control responsive to Applicant's document requests. *See* D.I. 45, pp. 4-7; *see also* Fed. R. Civ. P. 33, 34. Opposer, however, has steadfastly refused to comply with his discovery obligations as set forth in the Federal Rules. *See* D.I. 45, pp. 2-4 (summarizing the history of Opposer's avoidance of his discovery obligations); *see also id.*, Exs. A, B, C(1)-(11). Opposer's recalcitrant behavior should not be encouraged or rewarded. Applicant's Request for Reconsideration and its Renewed Motion to Compel should thus both be granted.

Respectfully submitted,

Dated: May 8, 2015

/William M. Merone/
Jonathan D. Reichman
William M. Merone
KENYON & KENYON LLP
One Broadway
New York, NY 10004
Tel.: (212) 425 – 7200
Fax: (212) 425 – 5288

Counsel for Applicant,
Wild Brain Entertainment, Inc.

CERTIFICATE OF SERVICE

I certify that a true copy of REPLY IN SUPPORT OF APPLICANT'S REQUEST FOR RECONSIDERATIONOF THE BOARD'S APRIL 3RD ORDER was served on the parties or counsel indicated below by electronic mail sent to the address(es) listed below (as agreed to by the parties):

Wendy Peterson
NOT JUST PATENTS LLC
P.O. Box 18716
Minneapolis, MN 55418
wsp@NJPLS.com

Counsel for Opposer

Dated: May 8, 2015

/William M. Merone/
Jonathan D. Reichman
William M. Merone
KENYON & KENYON LLP
One Broadway
New York, NY 10004
Tel.: (212) 425 – 7200
Fax: (212) 425 – 5288

Counsel for Applicant,
Wild Brain Entertainment, Inc.